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No. _____

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1992

AMBASSADOR BOOKS & VIDEO, INC.,
AND ALLEN DUNLAP, D/B/A
UNITED ARCADE,
Petitioners,

v.

CITY OF LITTLE ROCK, ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In this First Amendment challenge to an adult zoning ordinance under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the questions presented are:

1. The District Court made a finding of fact that the ordinance was enacted for the illicit purpose of suppressing constitutionally protected speech. Thus, did the Court of Appeals violate Fed.R.Civ.P. 52(a)'s "clearly erroneous" standard of review by substituting its own findings of fact, based only on its inference of what the evidence could also show, to reach the opposite conclusion to sustain the ordinance?

2. The ordinance does not altogether prohibit "sexually oriented businesses" from operating, but instead substantially limits the areas in which they may operate to 1.67% of the city and effectively caps their number. Thus:

a. Does the sole fact they are not totally prohibited automatically necessitate the legal conclusion that the ordinance is "content-neutral"?

b. Does the substantial evidence (including evidence of lack of secondary effect) and the finding of fact of illicit purpose create a presumption the ordinance is "content-based"?

c. Does the ordinance deny "reasonable alternative avenues of communication"?

3. Is an adult zoning ordinance directed at these existing adult uses with a three-year amortization period for them contrary to *Renton* and *Young* or a taking of property without just compensation?

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UNITED ARCADE,
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CITY OF LITTLE ROCK, ARKANSAS,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Ambassador Books & Video, Inc., and Allen Dunlap, doing business as United Arcade, petition the Court for a Writ of Certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Arkansas was rendered on January 28, 1993, and is unreported. *Ambassador Books & Video, Inc., and Allen Dunlap, d/b/a United Arcade v. City of Little Rock, Arkansas*, No. LR-C-92-35 (E.D.Ark. January 28,

1993). It is reprinted in the Appendix to this Petition beginning at A-3. The opinion of the Eighth Circuit Court of Appeals was rendered on April 1, 1994 and is reported as *Ambassador Book & Video, Inc. v. City of Little Rock, Arkansas*, 20 F.3d 858 (8th Cir. 1994). It is printed in the Appendix to this Petition beginning at A-26.

JURISDICTION

The Eighth Circuit Court of Appeals decided this case on April 1, 1994. This Petition is filed within 90 days of that date. It is therefore timely.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in § 1:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law, ...

ORDINANCE INVOLVED

Little Rock Ordinance No. 15,629 is codified as LITTLE ROCK CITY CODE §§ 17-211—17-216. In pertinent part, the ordinance reads as follows:

> **§ 17-211. Purpose and intent.**
>
> It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this article to restrict or deny access by adults to sexually oriented entertainment to their intended market unless otherwise restricted by law.
>
> **§ 17-212. Definitions.**
>
> . . .
>
> (2) *Adult bookstore or adult video store.* A commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:
>
> a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, videocassettes, or video reproductions, slides or other visual representations which depict or describe "specified sexual activities," or "specified anatomical areas;"

or

b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

...

(9) *Sexually oriented business.* An adult arcade, adult bookstore or adult video store, adult cabaret, adult motion picture theater, or adult theater whose inventory, merchandise, or performances are characterized by a preponderance of "specified sexual activities" or "specified anatomical areas."

(10) *Specified sexual activities.*

a. Human genitals in a state of sexual stimulation or arousal;

b. Acts of human masturbation, sexual intercourse, or sodomy;

c. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(11) *Specified anatomical areas.*

a. Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of a areola; and

b. Human male genitals in a discernable turgid state, even if completely and opaquely covered.

(12) *Residential district.* Any land within the city limits of Little Rock zoned as R-1, R-2, R-3, R-4, MF-6, MF-12, MF-18, MF-24, R-5, R-6, R-7, HR, MR, HDR, or PRD, as defined by this Code.

. . .

§ 17-214. Location of sexually oriented businesses.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within seven hundred fifty (750) feet of:
   (1) A church or other religious facility;
   (2) A public or private elementary, secondary, or post-secondary school;
   (3) A boundary of a residential zone . . . or any single-family or multiple-family residential use;
   (4) A public park;
   (5) A hospital or other medical facility; or
   (6) Properties listed on the National Register of Historical Places or local historic districts as identified by the Arkansas Historic Preservation Program.

(b) A person commits an offense if he causes or permits the operation, establishment, or maintenance of a sexually oriented business within seven hundred fifty (750) feet of another sexually oriented business.

§ 17-215. Non-conforming sexually oriented business.

(1) Any sexually oriented business lawfully operating on January 18, 1989, that is in violation of Subsection 4 of this ordinance shall be deemed a NON-CONFORMING USE. The non-conforming use will be permitted to continue for a period not to exceed three (3) years, unless sooner terminated for any reason or discontinued for a period of ninety (90) days or more. However, those sexually oriented businesses obligated by a written lease (executed prior to the passage of

this ordinance) that exceeds three (3) years from the effective date of this ordinance, or whose activity involves the investment of money in leasehold or improvements such that a longer period is necessary to prevent undue financial hardship, are eligible for review by the Planning Commission for a reasonable extension.

Such non-conforming uses shall not be increased enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 750 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is non-conforming.

(2) A sexually oriented business lawfully operating as a conforming use is not rendered a non-conforming use by the subsequent location of a church, public or private elementary school, public park, residential district or residential lot within 750 feet of the sexually oriented business. The provision applies only to an ongoing sexually oriented business . . . .

§ 17-216. Enforcement.

(1) Any person violating any part of this ordinance, upon conviction, is punishable by a fine not to exceed $500.00.

(2) If the violation is, in its nature, continuous in respect to time, the penalty for allowing the continuance thereof is a fine not to exceed two hundred fifty dollars ($250.00) for each day that the same is unlawfully continued.

(3) A person who operates or causes to be operated a sexually oriented business in violation of Sec-

tion 4 of this Ordinance will be subject to a suit for injunction as well as prosecution for criminal violations.

PASSED: January 17, 1989.

STATEMENT OF THE CASE

This case involves the constitutionality of a Little Rock zoning ordinance concerning "sexually oriented businesses" (SOB's). Little Rock Ordinance No. 15,629, codified as LITTLE ROCK CITY CODE §§ 17-211—17-216, the pertinent parts of which appear at pages 10-14, *supra,* under the heading "Ordinance Involved."

The ordinance contained the obligatory introductory "whereas clauses" describing the secondary effects these businesses allegedly may have derived from other cities' alleged experience,[1] including the following:

> hearings have determined that these types of businesses . . . may have a detrimental effect on the quality of [local] education; and . . .

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1. As is typical of the adoption of adult zoning ordinances after the virtual "how-to-book" of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the city conducted "hearings" to which it invited only persons who would support its pre-ordained conclusion that there were, in fact, secondary effects in the community, and it followed the "findings" of other cities.

At the trial in this case, it was established that the alleged secondary effects as to these businesses, which were susceptible to actual proof, were false. *See* discussion *infra*.

> said hearings also elicited information expressing . . . the detrimental effects these businesses have on the various uses of the properties mentioned; and
>
> the Board of Directors have determined that the image of the City . . . will be adversely affected by the presence of sexually oriented businesses . . .; and
>
> the location of sexually oriented businesses . . . may lead to increased levels of criminal activity in the vicinity of such sexually oriented businesses; and
>
> merchants in the City have expressed their concern about the adverse impact these types of businesses have on the value of their property and on their retail trade . . . .

Under the caption "Purpose and intent," the ordinance states in § 17-211:

> It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this article to restrict or deny access by adults to sexually oriented entertainment to their intended market unless otherwise restricted by law.

Just because they say it is not "content-based" (to protect against litigation) does not make it so.

The petitioners, Ambassador Books & Video, Inc. and United Arcade, each operate an adult bookstore and ar-

cades in Little Rock which were in existence prior to the enactment of the ordinance. In fact, United Arcade has been in existence in the same building since 1985; Am bassdor since about 1987. At the time of adoption of the ordinance in 1989, the city was well aware that both businesses were located within 750 feet of a church or residentially zoned property. Neither changed their location after the adoption of the ordinance. The ordinance was adopted January 17, 1989, and it was effective as to them on January 18, 1992.

After they were served with notice by the Little Rock Police Department's Vice Squad in mid-December 1991 that the city expected them to close by January 17, 1992, Ambassador Books & Video and United Arcade filed their complaint in the United States District Court for the Eastern District of Arkansas on January 15, 1992, alleging that the Little Rock SOB ordinance is unconstitutional under the First, Fifth, and Fourteenth Amendments.[2]

The case was tried to the District Court March 9-10, 1992, and the petitioners presented substantial and virtually uncontradicted evidence that the City's true purpose in enacting the ordinance was to suppress constitutionally protected speech.[3] The City showed only that it essentially

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2. Without opposition by the city, the District Court granted a preliminary injunction to maintain the status quo until this case was over. The city will not seek to set it aside until after this Petition for Writ of Certiorari is resolved.

One SOB not a party to this action closed in early 1994. The operator of United Arcade purchased land and opened a store after the trial in the permitted area (called the "red zone" at trial because of the color it had on the map).

3. The vice officers testified that the contents of the stores complied with the community standards and were not, in their judgment, obscene under Arkansas law.

followed the steps that the City of Renton did and built its own "record" without participation of those to be closed or limited by the ordinance. Petitioners demonstrated by testimony from City zoning officials, police officers, and other witnesses that the SOB's in Little Rock produced no real "secondary effects" shown in the "whereas" clauses, either prior to adoption of the ordinance or after, which might cause the City concern.[4] Finally, the proof showed that, under the ordinance, only a minute percentage of land (1.67%) in the City of Little Rock remained legally and physically available for SOB's to relocate.

On January 28, 1992, the District Court issued its Memorandum and Order upholding the ordinance. Appendix at A-3. Although the District Court made a finding of fact of an impermissible motive in the city's adoption of the SOB ordinance,[5] it held that the ordinance was not

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4. For example, the vice officers who served the notice on petitioners admitted at trial that: there was no increase in crime around SOB's in Little Rock (and there was evidence of a decrease in crime due to security concerns of stores), and persons under 18 were excluded, and, to their knowledge, were never in the stores. Store owners testified to security measures to prevent crime around their stores. Zoning officials and the United building owner and store operator testified that land values around the stores were not deleteriously affected, and these witnesses as well as the police testified that complaints have never been made by the church near United nor any of its residential or business neighbors.

Such is the purported strength of a self-serving "whereas" clause: the city elected to bring in no evidence of any "secondary effect" at the trial.

5. The City Attorney sent a "Work Assignment" form to two of his assistants: "Please get together/draft a legal opinion on this—I WANT TO SHUT THESE PLACES DOWN! Somehow. /s/ Mark." Plaintiffs' Exhibit 13. *See* Appendix at A-11, n.2.

"content-based" solely on the ground that the ordinance does not altogether ban adult businesses. The District Court further held that the language in the preamble to the ordinance, which essentially states that the ordinance is designed to promote the general welfare of the citizens of the city, is sufficient to show that the ordinance is designed to serve a substantial governmental interest. Finally, the court held that the ordinance leaves open reasonable alternative avenues of communication even though 1.67% of the city remains available for the SOB's to relocate even though there is an effective cap on the number of stores.[6]

Ambassador Books and United Arcade appealed to the Eighth Circuit, and that court affirmed on April 1, 1994. *Ambassador Books & Video, Inc. v. City of Little Rock, Arkansas,* 20 F.3d 858 (8th Cir.1994).

The Court of Appeals first observed that the ordinance was a content-neutral time, place, and manner regulation since it "does not prohibit sexually oriented businesses from operating, but only limits the areas in which they may do so." Appendix at A-35. The court found fault with what it characterized as an effort by the District Court to discern the "hidden (as opposed to the stated) purpose" of the ordinance (*id.* at A-36) and reasoned that only the clearest proof would suffice to discount the drafter's statement of the purpose of the ordinance in the "whereas" clauses. *Id.* at A-39. Finally, the court conducted its own

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6. The City of Little Rock takes in about 63,765 acres. Appendix at A-19, n.9. 1.67% of the total translates to 6.75% of the commercial and industrial land. *Id.* High school math tells us, however, that since SOBs must be 750 feet from each other, each takes up 40.58 acres ($\pi x750^2$ = 1,767,768.75 sq.ft. or 40.58 acres). The number of possible locations is thus effectively limited by the ordinance.

independent review of the evidence upon which the District Court based its finding of illicit purpose and concluded:

> [t]he evidence on which the district court relied to support its conclusion that the city's true, but hidden, intent in enacting the ordinance was different from what the ordinance itself stated, falls far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose.

Id. at A-37. Nowhere did the Court of Appeals mention its and the District Court's role under Fed.R.Civ.P. 52(a). Since the Court of Appeals concluded that the ordinance was content-neutral, it declined to hold that it presumptively violates the First Amendment. Instead, the court went on to find that the ordinance was designed to serve a substantial governmental interest even though the evidence at trial discounted the "whereas" clauses of the ordinance.

The Court of Appeals also found that the ordinance allowed for reasonable alternative avenues of communication. The fact 6.75% of the commercial or industrial land was potentially available for relocation was sufficient under Eighth Circuit precedent and *Renton*.[7] The Court of Appeals did not mention that this only means that 1.67% of the land in the City of Little Rock was available, and that there was an effective cap on the number of SOBs.

The Court of Appeals also rejected petitioners' claim that the aiming of the ordinance at petitioners with an amortization provision violated the First Amendment or was a taking without just compensation under the Fifth

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7. *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991) (6.6% of commercial land complied with *Renton*); *Renton*, 475 U.S. at 53 ("more than five percent of the entire land area of Renton").

Amendment. *Id.* at A-40—A-41.[8]

The Court of Appeals thus upheld the ordinance under the First, Fifth, and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

This case raises several significant First Amendment issues involving the ability of a municipality to follow the blueprint of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to zone adult uses, including existing uses right out of their property, with the proven illicit motive to restrict presumptively protected speech. *Renton* has been heavily litigated in the eight plus years since it was adopted, and the Court must speak on these issues again, lest the First Amendment become a subsidiary right to the police power to zone. The word *"Renton"* should not be a talisman that causes the First Amendment to evaporate, but this case shows that that is where we are going.

There are multiple significant issues under *Renton* raised in this case which are largely wrapped together[9]:

(1) Is complete deference now granted a city, which follows boilerplate language from ordinances in other cities and touches all the bases in adopting an adult use zoning ordinance, even when it is proved to the satisfaction of the finder of fact that the ordinance at issue is "content-based"

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8. The Court of Appeals also stated that petitioners cited no law for this proposition (Appendix at A-40), but petitioners cited at least ten cases in the brief in the Eighth Circuit. Eighth Circuit Brief of Appellants at 30.

9. For ease of reference, we depart slightly from the language and order of the "Questions Presented for Review."

and aimed at making the petitioners' businesses move or close? (The lower courts are split on this issue.)

(2) What happens under *Renton* when the only truly factual claims of the alleged "secondary effects" of adult uses which justify the city's zoning action which are subject to normal proof are proved at trial to be false? (Can self-serving "whereas" clauses of an adult zoning ordinance effectively insulate from any meaningful judicial review a city's true motive to suppress speech?)

(3) Under Fed.R.Civ.P. 52(a), can a court of appeals arbitrarily cast aside the findings of fact of the district court that the municipality had an illicit "content-based" intent to zone adult uses under *Renton* and instead replace that finding with its own findings based solely on strained inferences in order to shift the burden back to petitioners to overcome the presumption of constitutionality of the ordinance and then hold that they cannot? (In doing so here, the Court of Appeals made it virtually impossible to prove an ordinance "content-based" even when the proof compels that conclusion.)

(4) Is 1.67% of a city zoned for an adult use sufficient "alternative avenues of communication" under *Renton* (which involved 5+%)?

(5) Does *Renton* and the First Amendment, the due process clause, or the takings clause grant the city the power to pass an adult zoning ordinance that applies to petitioners' existing businesses, amortizes them, and forces them to move or close in three years?

Renton made it clear that its holding was premised on the fact that "Renton has not used 'the power to zone as a pretext for suppressing expression.' [*Young v. American Mini Theatres, Inc.*, 427 U.S.] at 84 (POWELL, J., concurring)." *Renton*, 475 U.S. at 54 (bracketed material added).

As a result of the holding of the Court of Appeals, however, municipalities can now find comfort to use *Renton* as a pretext for or even a complete cover to hide their illicit motive to restrict presumptively protected speech by adult use zoning. It is apparent from *Renton* that it was not intended to grant municipalities carte blanche to zone adult uses with a "content-based" intent. Yet, the holding of the Court of Appeals, if allowed to stand, has effectively placed the power to zone above free speech[10] and nullifies the District Court's function as the primary finder of fact under Fed.R.Civ.P. 52(a). The holding below will become precedent for further such intrusions into free speech.

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT AN ADULT ZONING ORDINANCE WHICH DOES NOT ALTOGETHER PROHIBIT SOB'S FROM OPERATING IS *IPSO FACTO* "CONTENT-NEUTRAL" UNDER *RENTON*.

A. The Court of Appeals misapplied *Renton*

1. The Court of Appeals erred in its interpretation and application of the *Renton* test to the Little Rock SOB ordinance.

In *Renton,* this Court made it clear that First Amendment challenges to city ordinances which purport to zone adult businesses must be analyzed under a three-part test. Under the first of this three-pronged analysis, a court faced with such a challenge must determine whether the ordinance at issue bans adult businesses altogether or

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10. Remember, the contents of the stores is not only presumed nonobscene, it is nonobscene. *See* note 3, *supra.*

whether it merely limits the areas of the city in which the businesses may operate. If the ordinance does not ban adult businesses altogether, it is proper to classify it as a form of "time, place, and manner" regulation. 475 U.S. at 46.

Once it is concluded that the ordinance is a "time, place, and manner" regulation, the next step is to determine whether the ordinance is content-neutral or whether it was enacted for the purpose of restraining speech on the basis of its content. If the latter is the case, the ordinance presumptively violates the First Amendment. 475 U.S. at 46-47. *See also Carey v. Brown*, 447 U.S. 455, 462-63 & n.7 (1980). "On the other hand, so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. at 47.

2. The Court of Appeals, however, held, as did the District Court, that the Little Rock SOB ordinance was not "content-based," and it did so solely on the ground that the ordinance does not ban adult businesses altogether:

> Under these standards, the Little Rock ordinance complies with the First Amendment. The ordinance does not prohibit sexually oriented businesses from operating, but only limits the areas in which they may do so. As the district court and Ambassador recognize, the ordinance is a typical time, place and manner regulation—here place—and is content-neutral.

Appendix at A-35.

The test employed by the courts below is not the *Renton* test. As discussed just above, this Court specifically pointed out in *Renton* that there is a difference between a content-*neutral* time, place, and manner regulation and a

content-*based* time, place, and manner regulation. The question of whether an ordinance is a time, place, and manner regulation at all is answered by determining whether the ordinance altogether bans adult businesses or whether it merely regulates where they may be located. Once it is determined that an ordinance can be classified as a time, place, and manner regulation because it does not altogether ban adult businesses, the court must then determine whether or not the time, place and manner regulation is content-based or content-neutral. 475 U.S. at 47-50. If it is content-based, it presumptively violates the First Amendment. *Id.* If it is content-neutral, only then should the court continue its analysis and determine whether the ordinance is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communication. *Id.* at 47.

In other words, it is plainly improper under *Renton* for a court to look only to whether the challenged ordinance bans all adult businesses to determine whether the ordinance is content-based, because these are two totally separate inquiries. Yet, that is exactly what the lower courts did in this case. The District Court did so more explicitly than did the Eighth Circuit:

> However, in *Alexander II*, the Eighth Circuit stated that the district court correctly noted "that the ordinance [did] not ban adults-only businesses altogether [and] rejected plaintiff's arguments that section 540.-410 was content-based." *Alexander II*, 928 F.2d at 282. It is this language which compels this Court to look no further than whether the ordinance bans all adult businesses in determining whether it is content-based. Under *Alexander II*, the ordinance would presumptively violate the First Amendment only if it banned adult businesses altogether.

Appendix at A-9. However, the Court of Appeals applied the same reasoning. *Id.* at A-35.

3. Under the holding of the Court of Appeals, all a city now needs to do to comply with *Renton* is adopt the boilerplate language from the Seattle ordinance (or any other ordinance that it can get its hands on) that there are some potential "secondary effects" with adult uses, whether the facts are true or not (and this case shows that they are not) and make sure that there is theoretically some place for the adult uses to relocate. The holding of the Court of Appeals that the ordinance is "content-neutral" on this record gives cities complete power to zone adult uses when there is, in fact, enough evidence of ulterior motive to persuade the District Court to make a Rule 52(a) finding of fact to that effect.

4. *Renton* was never meant to hold this. The fact that the Little Rock SOB ordinance does not altogether ban adult businesses does not answer the question of whether the ordinance is "content-neutral," and the courts below erred in holding to the contrary. Further, and in light of the District Court's factual finding that the ordinance was enacted for an impermissible and unconstitutional purpose, the entire outcome of the case is affected by the Court of Appeal's misapplication of the *Renton* test. Had that court applied the proper test, it would have concluded that the Little Rock SOB ordinance is unconstitutional under the First Amendment.

B. The split in the circuits

The standard applied by the Court of Appeals (and by a different panel of that court in *Alexander v. City of*

Minneapolis, 928 F.2d 278 (8th Cir. 1991)[11]), that a court need not look any further than whether the ordinance bans all adult businesses in determining whether it is "content-based," also conflicts with the standard under *Renton* employed by the Fifth and Ninth Circuits. *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir. 1992); *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987). In each of these cases, the courts analyzed the question of content-neutrality separately from the question of whether the ordinance at issue was a "time, place, and manner" regulation.

The Ninth Circuit's articulation of the proper test in *Tollis* provides this Court with the clearest evidence of the conflict in the circuits:

> We first must determine whether the ordinance is a "time, place, and manner regulation[ ]." If it is, we must then determine whether it is content-neutral or content-based. If we decide that the ordinance is content-neutral, we must then determine whether the proposed ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." . . . Like the ordinance involved in *Renton*, the ordinance before us is obviously a time, place, and manner regulation, as it does not ban adult theaters altogether.

827 F.2d at 1332 (citations omitted).

The Fifth Circuit in *Lakeland Lounge* applied that exact same test:

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11. Certiorari was never sought in *Alexander*. Petitioners argued below, but to no avail, that *Alexander* was contrary to *Renton* and should be distinguished or ignored.

> The Jackson ordinance does not ban adult businesses outright but merely limits the areas of the city in which they may operate. It is thus properly analyzed as a form of time, place and manner regulation. As such a regulation, it presumptively violates the First Amendment if it was "enacted for the purpose of restraining speech on the basis of its content," and it must be "designed to serve a substantial government interest" and may "not unreasonably limit alternative avenues of communication."

973 F.2d at 1257 (citations omitted).

The federal district courts also apply the *Renton* test as articulated by the Fifth and Ninth Circuits. In *Bamon Corp. v. City of Dayton*, 730 F.Supp. 80, 84 (S.D. Ohio 1990), *aff'd*, 923 F.2d 470 (6th Cir. 1991), the District Court reasoned that "municipalities may impose reasonable time, place and manner restrictions upon protected expression, as long as the legislation imposing those restrictions is a) content-neutral; b) supported by and designed to serve a substantial governmental interest; and c) allows for reasonable alternative channels of communication." The court held that the ordinance at issue in that case was a time, place, and manner regulation because it did not altogether ban the viewing of sexually explicit materials exhibited in viewing booths or restrict the availability of those materials. However, as required by *Renton*, and as the Fifth and Ninth Circuits did in *Lakeland Lounge* and *Tollis*, the court went on to analyze whether or not the ordinance was content-neutral.[12] *See also Schneider v. City of Ramsey*,

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12. The Sixth Circuit, however, eschewed reliance on *Renton* and decided that *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), should apply instead since it was not an adult zoning case. Certiorari was not sought in that case.

800 F.Supp. 815, 822 (D.Minn. 1992) ("[c]ontent-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication") (quoting *Renton*, 475 U.S. at 47); *Wolff v. City of Monticello*, 803 F.Supp. 1568, 1572 (D. Minn. 1992) (again referring to "content-neutral time, manner, and place restrictions").

Therefore, the test for "content-neutrality" under *Renton* employed by the Eighth Circuit is at odds with the test employed by at least two other federal circuits and by numerous federal district courts. The Court should grant certiorari to resolve this split of authority.

II.

THE COURT OF APPEALS COMPLETELY SUBVERTED THE DISTRICT COURT'S ROLE AS FINDER OF FACT UNDER FED.R.CIV.P. 52(a), CONTRARY TO *ANDERSON V. CITY OF BESSEMER CITY*, TO NULLIFY FINDINGS OF FACT IN PETITIONERS' FAVOR BY MERE INFERENCE TO SHIFT THE PRESUMPTION OF A FIRST AMENDMENT VIOLATION BACK AGAINST PETITIONERS.

A.

The decision of the Court of Appeals is contrary to the well settled rule of Fed.R.Civ.P. 52(a) that a lower court's findings of fact may be set aside on appeal only if "clearly erroneous." The factual issue decided by the District Court was significant to the constitutional test to be applied in this case: Was the motive of the City of Little Rock in passing this ordinance "content-based" zoning? The District Court concluded, clearly based on substantial evidence presented, witnesses subjected to cross-examination, and in determining the credibility of

witnesses that *it* (and not the Court of Appeals) heard, that it was. On this record, no other factual finding was possible. Yet, the Court of Appeals increased the burden on petitioners and made it virtually impossible for any adult use to ever claim that an ordinance was "content-based" —no matter what the evidence of motive. Any strained inference now can overcome the proof.

The District Court in this case specifically found that on the evidence before it, the Little Rock SOB ordinance was enacted not "to curb the secondary effects these [sexually oriented] business may cause but rather to suppress otherwise protected speech." This was not an off-the-wall conclusion—it was the focus of the trial, and there is plenty of evidence to support it. As the District Court stated:

> However, the Court's firm belief is that the ordinance was enacted not to curb the secondary effects these businesses may cause but rather to suppress otherwise protected speech. Four things compel this conclusion. First, there was a memo written by former City Attorney Mark Stodola in which he requested members of the City Attorney's office to look into something that would "shut these places down!"[2]
>
> 2. In full, the memo was in the form of a "Work Assignment Form." It asked two members of the office to do research and prepare an in-depth memo. In handwriting, the instructions line of the form read as follows, "Please get together/draft a legal opinion on this—I WANT TO SHUT THESE PLACES DOWN! Somehow./s/Mark."
>
> PLAINTIFFS' EXHIBIT 13. Second, in 1988 the city had a list of seven establishments all of which would have had to close under the ordinance as it was eventually enacted. Third, copies of the ordinance were distributed to business owners by the vice squad one month before its effective date, which is indicative of a

content-based ordinance. Finally, the evidence revealed no actual secondary effects around the businesses which the city wished to regulate.[3]

> 3. As stated by plaintiffs in their post-trial brief:
>
> > The vice officers testified that these two establishments have no greater crime around them than any other place. Also, minors are not permitted in them. The zoning people testified that they were unaware of any decline in property values. No complaints had been received from any neighbors of these establishments.
>
> PLAINTIFFS' POSTTRIAL BRIEF at 8. While the Court recognizes that defendant is entitled to rely on studies from other cites in enacting the ordinance, the lack of evidence regarding any secondary effects around the adult businesses in Little Rock favors a determination that the city had another purpose in enacting the ordinance.

Appendix at A-11 (footnotes in original).

Nevertheless, the District Court found that the ordinance is not content-based but rather is correctly treated as a form of time, place, and manner regulation solely on the ground that it "does not, on its face, ban sexually oriented business altogether" but instead "zones them into certain small, scattered sections of the city." Appendix at A-11.

On appeal to the Eighth Circuit, the Court of Appeals rejected the District Court's finding that the purpose of the ordinance was to suppress constitutionally protected speech and re-analyzed the evidence to fit its conclusion:

> The evidence on which the district court relied to support its conclusion that the city's true, but hidden, intent in enacting the ordinance was different from what the ordinance itself stated, fall far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose.

Appendix at A-37.

While this language conceivably might be construed to suggest that the facts found do not compel the District Court's conclusion, the Court of Appeals did not stop there. Rather, it then proceeded to sort through and re-evaluate the specific evidence relied upon by the District Court that supported that court's factual finding that the true purpose behind the ordinance was illegitimate:

> First was the handwritten statement by the city attorney, in instructing his staff to prepare a comprehensive opinion on dealing with sexually oriented businesses, that he "want[ed] to shut these places down! Somehow." This was the personal objective of the city attorney, who was not a member of the body that adopted the ordinance, and after he was informed that this could not be done, he changed his approach to the problem in favor of limiting the areas in which the businesses could operate. The City Attorney testified that in the ordinance he was "in no way, shape, form or fashion . . . attempting to" "put these people and these sorts of businesses out of businesses." "We knew that the law didn't allow that."
>
> Second was that in 1988 the city had a list of seven establishments, all of which would have had to relocate under the ordinance as enacted. This list does not indicate an improper motive by the city, but reflects the research the city did in considering potential problems or secondary effects.
>
> Third was that the vice squad distributed copies of the ordinance to business owners one month before the expiration of the three-year grace period. This action does not even suggest that the city adopted the ordinance in an attempt to put these entities out of business.

> Finally was the absence of any explicit evidence of actual secondary effects these businesses had. That does not show an improper purpose by the city. As noted, the city studied the problem because of complaints and concerns it had received from citizens about the sexually oriented businesses. Moreover, *Renton* recognized that in adopting such an ordinance, a city "was entitled to rely on the experiences of . . . other cities," 475 U.S. at 51—as Little Rock did here.

Appendix at A-37—A-38. The Court of Appeals ultimately concluded, in essence, that the language contained in the "whereas" clauses of the ordinance was sufficient to show that the ordinance was content-neutral and that, therefore, it is inappropriate to look any further into the drafters' intent, no matter what the evidence of illicit motive.

B.

The Court of Appeals erred in at least two respects in reviewing the District Court's findings.

1. The court erred under Fed.R.Civ.P. 52(a) and *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985), which both make it absolutely clear that a district court's findings of fact are not to be set aside on appeal unless "clearly erroneous." Rule 52(a) provides in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Anderson v. City of Bessemer City* this Court provided detailed guidance on how that standard must be applied by the federal courts of appeals in language especially pertinent here:

> "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.* The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.*

Id. at 573-74 (emphasis added; citations omitted).

In this case, the Court of Appeals conducted an independent review of the District Court's finding concening the purpose behind the enactment of the Little Rock SOB ordinance. Initially, it is clear under *Renton* that the District Court's finding that a city ordinance purporting to zone SOB's was enacted for an illegitimate purpose is a finding of fact subject to the "clearly erroneous" standard of review:

> The District Court's finding as to "predominate" intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression

of free expression.

475 U.S. at 48.[13]

2. Here, the Court of Appeals failed to even consider applying the clearly erroneous standard at all to the District Court's finding of illicit intent. Rather than give deference to the District Court's findings, it instead observed that "[c]ourts . . . normally do not look behind the legislative findings and policy statements to attempt to discern the hidden (as distinguished from the stated) purpose of the legislation." Appendix at A-36. The court went on to rely upon *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), for the proposition that an "alleged illicit legislative motive" is insufficient to invalidate an "otherwise constitutional statute." Appendix at A-36.

In sum, the Court of Appeals essentially held that it was improper for the District Court to inquire at all into the purpose behind the enactment of the ordinance since the "whereas" clauses stated that the purpose of the ordinance was legitimate. If this view of the law is correct; *i.e.*, if the constitutional inquiry must end with the reading of a self-serving "whereas" clause; then any adult zoning ordinance whose drafters just do the obvious and put the correct language in the preamble or "whereas" clause is now virtually insulated from a First Amendment challenge. This, however, is not the law, and it is certainly not what this Court intended when it decided *Renton*. To the contrary, *Renton* specifically observed that the "predominant intent" of the drafters is the key to determining whether an

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13. *See also Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2d Cir. 1976); *Dowell v. United States*, 553 F.2d 1233 (10th Cir. 1977); *Bostick v. Boorstin*, 617 F.2d 871 (D.C.Cir. 1980) (clearly erroneous standard applies to district court's finding relating to design, motive, and intent).

ordinance is "content-neutral" or "content-based."

The Court of Appeals cited *Renton* for the proposition that "predominant intent" may only be discerned from reviewing the drafters' stated purpose. That is not what this Court held in *Renton*. To the contrary, the Court did no more than defer to the District Court's finding that the drafter's "predominant intent" was legitimate. The Eighth Circuit in this case should have followed that example and similarly deferred to the district court's finding relating to intent. As this Court stated in *Anderson v. City of Bessemer City*, "[t]he question we must answer . . . is not whether the [court of appeal's] interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." 470 U.S. at 577 (bracketed material added).

Here, as in *Anderson* and in *Renton*, deference must be paid to the District Court's finding that the Little Rock SOB ordinance was enacted for an unconstitutional purpose. The District Court was not required to analyze the ordinance in a vacuum and resort only to the self-serving "whereas" clauses; it was well within its duty and right in reviewing the additional proof of illicit motivation on the part of the drafters.

Accordingly, the decision of the Court of Appeals is contrary to two other cases of this Court applying the clearly erroneous standard to legislative intent, one of which was decided only four weeks after *Anderson*. *Hunter v. Underwood,* 471 U.S. 222, 229 (1985) (clearly erroneous standard applied to finding of racial animus in legislative intent); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent

as may be available").

3. Further, on this record, the District Court's finding of unconstitutional motive clearly cannot be "clearly erroneous." To the extent that the Court of Appeals may have even made an attempt at all to apply that standard of review, it misapplied it. Under *Anderson*, the "clearly erroneous" standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573. In contravention of these fundamental precepts, the Court of Appeals in this case undertook its own independent review of the evidence of intent and simply disagreed with the District Court that the evidence demonstrated that the drafter's purpose was to suppress protected speech.

The approach of the Court of Appeals was plainly improper under *Anderson*. Indeed, the evidence before the District Court was more than sufficient to justify a finding of unconstitutional purpose in the passage of the ordinance.

First, as the District Court correctly pointed out, prior to the adoption of the ordinance, former City Attorney Mark Stodola (who is now the Prosecuting Attorney for the judicial district which includes Little Rock), wrote a memo in which he requested that members of the City Attorney's Office assist him in finding a way to "shut these places down!" Every action taken thereafter by the City was calculated to close all existing SOB's, *and the City has never really denied it with proof.*

Additionally, the proof showed that in 1988 the City had a list of seven establishments (Plaintiffs' Exhibit 6) all of which it determined, during the process of the adoption

of the ordinance, would have had to close under the ordinance as it was eventually enacted. Of these seven, only four remained as of the time that the ordinance went into effect in 1992.

Third, the ordinance was enforced by the Vice Squad of the Little Rock Police Department. Stodola had previously sent a letter to Captain Rowen of the Police Department stating that "[t]he Little Rock Police Department will have no responsibility for enforcing the ordinance." (Plaintiffs' Exhibit 9) Yet, when the City decided that it was time to enforce the ordinance one month before its effective date, the City *zoning* people sent LRPD *Vice* Officers Welter and Hampton around to distribute copies of the ordinance to the SOB's to tell them to close down.

Fourth, the record here is singularly devoid of any evidence that the adult establishments have any secondary effects that the City wants to regulate. In fact, all the evidence was to the contrary. The vice officers testified that these two establishments have no greater crime around them than any other type of establishment. Also, minors are not permitted in them. The undisputed proof showed that the SOB's have not caused property values to decline in their areas. No complaints had been received from any neighbors of these establishments either by the police, zoning people, or the stores themselves. There has been no claim by the City that the materials inside these SOB's are obscene, nor does the record reflect that they are otherwise in violation of Arkansas law.

In sum, the proof was sufficient to justify a finding of unconstitutional purpose. Even if the proof could have supported a contrary finding, *Anderson* required that the Eighth Circuit defer to the District Court's finding. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly

erroneous." 470 U.S. at 574.

C.

Once it is determined by this Court that the District Court's finding of unconstitutional purpose is entitled to deference, the entire posture of this case must change. Under *Renton*, even if the Little Rock SOB ordinance is a "time, place, and manner" regulations, it is still "content-based" because it is designed to inhibit the protected expression rather than to curb the secondary effects resulting from the protected expression. Since it is indeed "content-based," it presumptively violates the First Amendment.

III.

AN ADULT ZONING ORDINANCE THAT LIMITS ADULT USES TO 1.67% OF THE CITY DENIES "REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION" AND THUS VIOLATES THE FIRST AMENDMENT.

A.

The Court held in *Renton* that

> we note that the ordinance leaves some 520 acres, *or more than five percent of the entire land area* of Renton open to use as adult theater sites. The District Court found, and the Court of Appeals did not disputed the finding, that the 520 acres of land consists of "[a]mple, assessible real estate," including "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads."

475 U.S. at 53 (bracketed material and emphasis added).

Whatever the nature of the land in *Renton*, the City here only made 1.67% of the whole city (or 6.75% of the

commercial and industrial land) available. Appendix at A-19. And, what it made available was largely unusable by any stretch of the imagination: *e.g.*, land of the Little Rock Port Authority prohibited by the bill of assurance from being used for retail sales, the slack water *harbor* of the LRPA,[14] land in the parking lot of the Little Rock Regional Airport, land in an industrial district where all the land is taken by large industrial users and smaller parcels are never going to be available until the industrual user goes out of business and subdivides the huge property, space in the Federal Reserve Bank building downtown (no kidding), a 25-story bank building, land at a corner in an exclusive subdivision with half million dollar homes and a huge modern golf course,[15] a piece inside a strip shopping center in an "upscale" part of town, two pieces of land in the center of two huge plots set aside for shopping centers or warehousing with no roads into them, and the like. There are few criss-crossing freeways, highways, and roads as in *Renton*. Also, the City went to great lengths to tailor this ordinance to make it as onerous as possible on adult uses and still make a halfway colorable argument the ordinance is "content-neutral."

We agree under *Renton* that we have to compete with all other contenders in the open market for land, and we could do so if the City had not done its "homework" and made the ordinance as exclusionary as possible and still

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14. The city's area figures apparently included the water in the harbor.

15. If the City really believes that there are secondary effects, why did it make some of these "red zones" in "exclusive areas" where an adult use would like never locate anyway and the land values might really decline.

After all, where these uses are, the land values are not high to begin with.

leave some land theoretically available.[16]

Where should the line be drawn? Is *Renton's* 5+% the benchmark, or is it less? What about the evidence in the case? On the uncontradicted evidence, 1.67% in the "red zone" in Little Rock, Arkansas does not provide "reasonable alternative avenues of communication" because so little of that 1.67% is practically available and it thus violates the First Amendment.

B.

By limiting the number of places that adult uses can locate in the City of Little Rock, the ordinance thus suppresses or greatly restricts access to lawful speech.

The ordinance requires that adult uses be at least 750 from each other and only in the "red zone." Each adult use takes up 40 acres. *See* note 6, *supra.* Even in the best case scenario where all the land is easily available (which this case is not), there are just so many that are legally possible. Thus, the City has capped the number of adult establishments.

In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 n.35 (1976) (plurality opinion of STEVENS J., joined by BURGER, C.J., and WHITE and REHNQUIST, JJ.), the Court made it clear that the Detroit ordinance would not withstand constitutional attack if it limited the ability of adult uses to locate in the City:

The situation would be quite different if the ordinance

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16. As stated above, United opened another location in the "red zone" after the trial in this case. This was probably the only piece of land realistically available. What happens now to Ambassador Books & Video? It, of course, has to close, and that is just what the City wants.

> had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight.

Similarly, the Court invalidated a nude dancing prohibition in *Schad v. Borough of Mount Ephriam,* 452 U.S. 61 (1981), because the ordinance limited the number of such uses. The Court quoted Justice STEVENS' observation that *Young* would have come out differently "if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Schad,* 452 U.S. at 76 (quoting *Young*, 427 U.S. at 71 n.35, quoted just above). Finally, *Renton* itself quoted the above language from *Young* with approval. *Renton,* 475 U.S. at 54.

IV.

AN ADULT ZONING ORDINANCE DIRECTED AT EXISTING USES WITH A THREE YEAR GRACE PERIOD IS CONTRARY TO *YOUNG* AND *RENTON* AND VIOLATES THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS.

It is undisputed that the City knew as a part of its research that there were seven adult uses when it adopted the ordinance that would be affected by it. Not to be content with the forces of the free market,[17] it directed that the ordinance apply to them after a grace or amortization period where they would either have to move or close in

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17. Some of those uses closed during the grace period, and another, not a party to this case, closed this year.

three years. LITTLE ROCK CITY CODE § 17-215(a).[18]

A critical element of the holdings of both *Young v. American Mini Theatres, Inc.*, 427 U.S. at 52-55 & 71-72 n.35 (plurality opinion of STEVENS J., joined by BURGER, C.J., and WHITE and REHNQUIST, JJ.) (the latter quoted just above), and *Renton,* 475 U.S. at 52, is that no existing uses were affected by the ordinances.

This court apparently has never addressed the issue of amortization of a zoning use, let alone an adult zoning use. The lower courts have divided on the application of ordinances to existing adult uses.

A slight majority of cases have sustained varying amortization periods if they are reasonable (as did the courts below). Annot., 8 A.L.R.5th 391, § 10[a]; GERARD, LOCAL REGULATION OF ADULT BUSINESSES § 4.13 (1994). Some courts have upheld the constitutionality of adult zoning ordinances because existing uses were exempt.[19] Even the cases upholding amortization periods in

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18. Section 17-215(a) provides:

> The nonconforming use will be permitted to continue for a period not to exceed three (3) years, unless sooner terminated for any reason or discontinued for a period of ninety (90) days or more. However, those sexually oriented businesses obligated by a written lease (executed prior to the passage of this article) that exceeds three (3) years from the effective date of this article, or whose activity involves the investment of money in leasehold or improvements such that a longer period is necessary to prevent undue financial hardship, are eligible for review by the planning commission for a reasonable extension.

19. *Genusa v. City of Peoria,* 619 F.2d 1203, 1210-12 & n.18 (7th Cir. 1980); *Walnut Properties, Inc. v. City of Whittier,* 861 F.2d 1102, 1110 (9th Cir. 1986) (apparently recogniz-

adult zoning cases apply varied tests.[20] Other cases hold them unconstitutional because they are directed at existing uses.[21] An amortization clause was involved in the Dallas ordinance which reached this court in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990), but the amortization issue was not involved in the case here.[22]

One problem immediately apparent from the City's ability to grant extensions (not *exemptions*) is the potential for administrative delay and abuse making the ordinance unconstitutional as applied. *See, e.g., FW/PBS, Inc. v. City of Dallas, supra.*

This issue is constitutionally significant and should now be resolved in this case.

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ing rule); *Walnut Properties, Inc. v. City Council of Long Beach,* 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, 414, *cert. denied,* 449 U.S. 836 (1980).

20. *See, e.g, Hoffman v. Kinealy,* 389 S.W.2d 745 (Mo. 1965) (discussing the discord); Annot., 8 A.L.R.5th 391, § 3[a-b].

21. *Alexander v. City of Minneapolis,* 698 F.2d 936, 937-38 (8th Cir.1983); *Avalon Cinema Corp. v. Thompson,* 667 F.2d 659, 662 (8th Cir. 1981) (en banc); *Walnut Properties, Inc. v. City of Whittier,* 808 F.2d 1331, 1336 (9th Cir.1986); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1214 (5th Cir. 1986); *CLR Corp. v. Henline,* 702 F.2d 637 (6th Cir. 1983).

22. *Dumas v. City of Dallas,* 648 F.Supp. 1061 (N.D.Tex. 1986), *aff'd,* 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part on other grounds,* 493 U.S. 215 (1990), relied on by the Court of Appeals. Appendix at A-41.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 30, 1994

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APPENDIX

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District Court's Opinion of January 28, 1993:
Ambassador Books & Video, Inc., and Allen Dunlap, d/b/a United Arcade v. City of Little Rock, Arkansas, U.S. Dist.Ct. No. LR-C-92-35 (E.D.Ark. Jan. 28, 1993) A-3

Eighth Circuit's Opinion of April 1, 1994:
Ambassador Books & Video, Inc. v. City of Little Rock, Arkansas, 20 F.3d 858 (8th Cir. 1994) . A-26

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

AMBASSADOR BOOK & VIDEO, INC.,
and ALLAN DUNLAP,
d/b/a UNITED ARCADE PLAINTIFFS

vs. No. LR-C-92-35

CITY OF LITTLE ROCK, ARKANSAS DEFENDANT

MEMORANDUM AND ORDER

This case involves the constitutionality of a Little Rock zoning ordinance concerning sexually oriented businesses. LITTLE ROCK CITY ORDINANCE No. 15,629 is codified as LITTLE ROCK CITY CODE §§ 17-211 to 17-216. In pertinent part, the ordinance reads as follows:

> **Sec. 17-211. Purpose and intent.**
>
> It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this article to restrict or deny access by adults to sexually oriented entertainment to their intended market unless otherwise restricted by law.

Sec. 17-212. Definitions

. . .

(2) *Adult Bookstore or adult video store.* A commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:

a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, videocassettes, or video reproductions, slides or other visual representations which depict or describe "specified sexual activities," or "specified anatomical areas;" or

b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

. . .

(9) *Sexually oriented business.* An adult arcade, adult bookstore or adult video store, adult cabaret, adult motion picture theater, or adult theater whose inventory, merchandise, or performances are characterized by a preponderance of "specified sexual activities" or "specified anatomical areas."

(10) *Specified sexual activities.*

a. Human genitals in a state of sexual stimulation or

arousal;

b. Acts of human masturbation, sexual intercourse, or sodomy;

c. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(11) *Specified anatomical areas.*

a. Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

b. Human male genitals in a discernable turgid state, even if completely and opaquely covered.

(12) *Residential district.* Any land within the city limits of Little Rock zoned as R-1, R-2, R-3, R-4, MF-6, MF-12, MF-18, MF-24, R-5, R-6, R-7, HR, MR, HDR, or PRD, as defined by this Code.

. . .

Sec. 17-214. Location of sexually oriented businesses.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within seven hundred fifty (750) feet of:

(1) A church or other religious facility;

(2) A public or private elementaty, secondary, or post-secondary school;

(3) A boundary of a residential zone . . . or any single-family or multiple-family residential use;

(4) A public park;

(5) A hospital or other medical facility; or

(6) Properties listed on the National Register of Historical Places or local historic districts as identified by the Arkansas Historic Preservation Program.

(b) A person commits an offense if he causes or permits the operation, establishment, or maintenance of a sexually oriented business within seven hundred fifty (750) feet of another sexually oriented business.

Ambassador Books & Video, Inc. operates an adult bookstore and adult arcade in Little Rock which were in existence prior to the enactment of the ordinance. United Arcade also operates an adult bookstore and adult arcade in Little Rock which have been in existence since 1985. Both businesses were located within 750 feet of a church or residentially zoned property at the time of the adoption of the ordinance and have not changed their location. This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3,4).

Plaintiffs allege that the ordinance violates the First Amendment to the United States Constitution

> because (a) it is not prospective in application (b) because it unreasonably restricts the location of sexually oriented businesses in the City of Little Rock so as to be preclusive, and (c) it is a speech content based restriction on admittedly (see §17-211, supra) protected speech.

PLAINTIFFS' COMPLAINT at 5. Plaintiffs also allege that the ordinance violates the Fifth and Fourteenth Amend-

ments because it constitutes an inverse condemnation of plaintiffs' businesses. Finally, plaintiffs allege that the ordinance constitutes a bill of attainder in violation of U.S. CONST. art. I, § 10, cl. 1.

I. FIRST AMENDMENT

A. STANDARDS TO BE APPLIED

The most important case in First Amendment challenges to the zoning of adult businesses is *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). The constitutional standards required by *Renton* have been interpreted in several circuits, and the Eighth Circuit had this to say in *Alexander v. City of Minneapolis (Alexander II)*, 928 F.2d 278 (8th Cir. 1991):

> Noting that the ordinance does not ban adults-only businesses altogether, the District Court rejected plaintiff's arguments that section 540. 410 was content-based. Instead, the court . . . correctly treated section 540.410 "as a form of time, place, and manner regulation."
>
> . . .
>
> The stated purpose of the ordinance is "to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood." § 540.410(a). Conceding that this stated purpose was permissible, Alexander argued that the real intent of the City was to eliminate adult businesses because of their content. The District Court disagreed, finding that the ordinance was designed to serve a substantial governmental interest, and thus

passed the first part of the *Renton* test.

. . .

> Turning to the second part of the *Renton* test requiring reasonable alternative avenues of communication, the District Court examined the effect of the ordinance on adults-only businesses.

Alexander II, 928 F.2d at 282-283 (quoting, *Renton*, 475 U.S. at 47) (emphasis added).

Under the language of the Eighth Circuit in *Alexander II*, the Court is compelled to apply a three-part test to plaintiffs' claims under the First Amendment. First, if the ordinance does not ban adults-only businesses altogether, the ordinance is not content-based and is correctly treated as a form of time, place, and manner regulation. Second, the ordinance must be designed to serve a substantial governmental interest, and third, it must not unreasonably limit alternative avenues of communication.

Other circuits appear to require another step, namely that the ordinance also pass a content-based/content-neutral determination after the initial determination that the time, place and manner analysis is applicable. The Fifth Circuit in *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255 (5th Cir.), *reh'g, en banc, denied*, 979 F.2d 211 (5th Cir. 1992), stated it this way:

> The Jackson ordinance does not ban adult businesses outright but merely limits the areas of the city in which they may operate. It is thus properly analyzed as a form of time, place, and manner regulation. As such a regulation, it presumptively violates the First

> Amendment if it was "enacted for the purpose of restraining speech on the basis of its content, and it must be "designed to serve a substantial government interest" and may "not unreasonably limit alternative avenues of communication."

Id. at 1257 (citations omitted). The Court quotes *Renton* for the proposition that if an ordinance is content-based, it presumptively violates the First Amendment.

The Ninth Circuit apparently agrees with the Fifth Circuit. In *Tollis, Inc. v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987) the court laid out its test.

> We first must determine whether the ordinance is a "time, place, and manner regulation[ ]." If it is, we must then determine whether it is content-neutral or content-based. If we decide that the ordinance is content-neutral, we must then determine whether the proposed ordinance "is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication."

Id. at 1332 (citations omitted).

However, in *Alexander II*, the Eighth Circuit stated that the district court correctly noted "that the ordinance [did] not ban adults-only businesses altogether [and] rejected plaintiff's arguments that section 540.410 was content-based." *Alexander II*, 928 F.2d at 282. It is this language which compels this Court to look no further than whether the ordinance bans all adult businesses in determining whether it is content-based. Under *Alexander II*, the ordinance would presumptively violate the First Amendment only if it banned adult businesses altogether.

B. PROSPECTIVE APPLICATION

Before addressing the three-part test given above, the Court must confront plaintiffs' argument that because "[i]n all the cases to address the issue, an adult zoning ordinance which applied to existing adult businesses was held unconstitutional—it is clear that such ordinances can only be prospective in application." PLAINTIFFS' POST-TRIAL BRIEF at 1. Plaintiffs then cite several cases for this proposition. However, one of the cases cited by plaintiffs, *Alexander v. City of Minneapolis*, 713 F.Supp. 1296 (D.Minn.1989), has been overruled.[1] In *Alexander II*, the court reversed the district court's holding that an ordinance was unconstitutional that did in fact force existing businesses to relocate. Therefore, plaintiffs' argument cannot be accepted.

C. CONTENT-BASED OR CONTENT-NEUTRAL

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[1] The district court in *Alexander v. City of Minneapolis*, 713 F.Supp. 1296 (D.Minn.1989) made this statement:

> [T]he Minneapolis ordinance not only prescribes where new adult facilities can locate within the city, it also closes several adult businesses which have been in existence for as many as 25 years. The fact that these businesses are forced to close does not automatically invalidate the Minneapolis ordinance. However, if these businesses are closed, without allowing them reasonable alternatives as to where to reopen, the ordinance would have "the effect of suppressing, or greatly restricting access to, lawful speech."

Id. at 1304 (quoting, *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1975)).

The ordinance does not, on its face, ban sexually oriented businesses altogether. Rather, the ordinance zones them into certain small, scattered sections of the city. Therefore, the Court feels constrained to hold, under the Eighth Circuit's analysis in *Alexander II*, that the ordinance is not content-based but rather is correctly treated as a form of time, place, and manner regulation.

However, the Court's firm belief is that the ordinance was enacted not to curb the secondary effects these businesses may cause but rather to suppress otherwise protected speech. Four things compel this conclusion. First, there was a memo written by former City Attorney Mark Stodola in which he requested members of the City Attorney's office to look into something that would "shut these places down!"[2] Plaintiffs' Exhibit 13. Second, in 1988 the city had a list of seven establishments all of which would have had to close under the ordinance as it was eventually enacted. Third, copies of the ordinance were distributed to business owners by the vice squad one month before its effective date, which is indicative of a content-based ordinance. Finally, the evidence revealed no actual secondary effects around the businesses which the city wished to regulate.[3]

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[2] In full, the memo was in the form of a "Work Assignment Form." It asked two members of the office to do research and prepare an in-depth memo. In handwriting, the instructions line of the form read as follows, "Please get together/draft a legal opinion on this—I WANT TO SHUT THESE PLACES DOWN! Somehow. /s/Mark."

[3] As stated by plaintiffs in their post-trial brief:

In *Tollis,* the Ninth Circuit indicated that:

> "[a] regulation is 'content-neutral' if it is '*justified* without reference to the content of the regulated speech.'" This requirement is met if the involved ordinance is "aimed to control secondary effects resulting from the protected expression" rather than at inhibiting the protected expression itself. Our initial determination, therefore, is whether the "predominate (sic) purpose in enacting the ordinance is suppression of first amendment rights" or, instead, the amelioration of deleterious secondary effects. If the ordinance is predominantly aimed at the suppression of first amendment rights, then it is content-based and presumptively violates the first amendment.

Id. at 1332.

This Court is of the opinion that the city's predominant intent was to hinder or alleviate the operation of

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> The vice officers testified that these two establishments have no greater crime around them than any other place. Also, minors are not permitted in them. The zoning people testified that they were unaware of any decline in property values. No complaints had been received from any neighbors of these establishments.

PLAINTIFFS' POSTTRIAL BRIEF at 8. While the Court recognizes that defendant is entitled to rely on studies from other cites in enacting the ordinance, the lack of evidence regarding any secondary effects around the adult businesses in Little Rock favors a determination that the city had another purpose in enacting the ordinance.

these adult businesses because of their content and not because of any secondary effects they might have caused. Although, on its face, the ordinance declares its purpose to be the amelioration of secondary effects, the evidence presented to the Court establishes a contrary conclusion.

Cases involving zoning of adult businesses have been numerous, and the hoops cities must jump through to meet constitutional muster are becoming fairly standard. So standard that, arguably, cities are able to comply by reading studies from other cities on the secondary effects caused by these businesses and stating in their ordinance that the predominant purpose is to ameliorate these effects all the while zoning these businesses into only two or three percent of "available" land. While complying with constitutional standards, they can accomplish the original goal of "shutting these places down!"

In this instance, the original seven businesses in existence when the ordinance was visualized would have had to close under the ordinance as enacted. This and the other evidence pointed out by plaintiffs leave the court with one conclusion: that the city's predominant intent was the suppression of speech. Nonetheless, *Alexander II* will not allow a conclusion that the ordinance is content-based. As stated earlier, if the Court were allowed to hold that the ordinance was content-based, it would presumptively violate the First Amendment and this Court's inquiry would go no further. As it is, the Court must proceed to the second and third steps of the analysis.

D. SUBSTANTIAL GOVERNMENTAL INTEREST

Plaintiffs did not specifically argue in their complaint

or in their post-trial brief that the city's ordinance was not designed to serve a substantial governmental interest. However, they argued strenuously that the city had an illicit motive in enacting the ordinance. It is the opinion of this Court that plaintiffs are correct in their assertion that the city's motive in enacting the ordinance had less to do with secondary effects and more to do with "shutting these places down!" However, the ordinance's stated purpose is to "promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city." LITTLE ROCK CITY CODE § 17-211.

In *Renton*, the Court had this to say about what constitutes a substantial qovernmental interest: "As a majority of this Court recognized in *American Mini Theatres*, a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (quoting, *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976)) The Court went on to say that the ordinance was aimed at preventing secondary effects and that the ordinance clearly met the standard. In addition, the *Renton* Court stated that the city was entitled to rely on the experiences of other cities in enacting its ordinance. *Id.* at 51.

In this case, the stated purpose of the ordinance has been recognized in many instances as a substantial governmental interest. The evidence also indicates that the city relied on studies from other cities in enacting the ordinance. Therefore, it appears that the ordinance was designed to serve a substantial governmental interest and meets the second prong of the analysis.

E. REASONABLE ALTERNATIVE AVENUES OF COMMUNICATION

Plaintiffs next argue that the ordinance is unconstitutional because it unreasonably restricts the location of sexually oriented businesses in the city of Little Rock. According to defendant, the following areas are available for sexually oriented businesses to locate:

Adult Use 750 Ft. Setback		(Parks, Residential-Zoning or Unit, School Historic Site, Hospital, Church
Heights/Hillcrest	76.56 A[4]	
Port	1325.52 A	- Most Controlled by Port or Airport
Boyle Park	16.53 A	
Geyer Springs East	43.06 A	
Fourche	79.00 A	
I-30	43.91 A	
65th Street East	513.06 A	
Otter Creek	186.87 A	
I-430	32.14 A	
Hwy 10	4.30 A	
Pleasant Valley	0.88 A	
Downtown	5.4 A	
	2,327.41 A	3.64 sm[5] or 3.65% of City

DEFENDANT'S EXHIBIT #10 at 2.

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[4] "acres"

[5] "square miles"

Plaintiffs argue that much of this land should not be considered "available" under the test set forth in *Renton*. The task for the Court is to determine what legal standards should apply in determining whether land is "available." In *Alexander II* the Eight Circuit reversed the district court because the wrong standard had been applied. The court determined that the district court had "declined to decide as a matter of law whether the percentage of land theoretically open to adult businesses was sufficient to provide reasonable access to protected speech." *Alexander II*, 928 F.2d at 283 (emphasis added). Instead the district court focused on actual available locations and the plaintiff's unsuccessful attempts to relocate his business. According to the court:

> [T]estimony from Alexander that no one would sell or lease property on which he could relocate his businesses was . . . irrelevant to the First Amendment inquiry. The record clearly shows that other owners of adult businesses were able to find suitable relocation sites. That Alexander must fend for himself "in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." The Supreme Court has "never suggested that the First Amendment compels [a municipal] government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices."

Id . (quoting *Renton*, 475 U.S. at 54) (citations omitted). Therefore, arguments that, realistically, no one in a certain area would sell or rent to an adult business must be disregarded. Additionally, there is evidence in the case at bar that plaintiff United Arcade applied for and was grant-

ed a conditional use permit from the Little Rock Planning Commission to locate within a permissible area on 65th Street. *See,* Defendants' Motion to Supplement Record (Document #13).

The plaintiffs also cite *Woodall v. City of El Paso*, 950 F.2d 255 (5th Cir. 1992) for the proposition that if land is not *physically* or *legally* suitable for an adult business, it should fail under *Renton*. The Court would note first that much of that opinion was withdrawn by *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir.), *cert. denied*, 113 S.Ct. 304, 121 L.Ed.2d 227 (1992). There, the court said:

> [W]e do not endorse appellants' formulation that land is not available for use by the adult businesses if it would be "unreasonable" to expect adult businesses to relocate there. Rather, the jury should have been instructed ... that land with physical characteristics that render it unavailable for *any kind of development*, or legal characteristics that exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton*.... Cities that allocate only land that is completely unsuitable from a legal or physical standpoint for adult business use do exactly what the court proscribed in *Renton: effectively* suppress protected speech.

Id. at 1306 (former emphasis added, latter in original). Plaintiffs argue that several areas are unavailable because there are no roads or utilities running into that area. As this Court reads *Woodall*, this kind of showing is insufficient. The fact that an area has no roads or utilities does not render it "unavailable for *any kind of development.* " Although the court was not specific, it appears their defi-

nition of "unavailable" would include areas where no roads or utilities *could be* installed as opposed to those where they simply *had not been* installed. Such evidence must involve the physical characteristics of the land itself, not the lack of improvements.[6]

On the other hand, the Court agrees with plaintiffs' argument that a portion of the Little Rock Port Authority is "legally" unavailable. The bill of assurance governing the property states that:

> Areas 101, 102, 103, 104, 300, 301, and 302 herein conveyed shall be used only for industrial, manufacturing, warehousing, or distribution purposes. It shall not be used for residential purposes, nor *for the retail sale of any merchandise* or services, except that any occupant of the property, either owner or tenant, may sell at retail those products which are manufactured or handled at wholesale by the occupant.

PLAINTIFFS' EXHIBIT #7 at 1. This land cannot be considered even theoretically available because retail businesses are prohibited by law. Testimony at trial indicated that only 61.6 acres of land covered by the bill of assurance would not exclude retail businesses. Tr. at 240.

There was also testimony concerning the availability of the Port Authority Area referred to as the Slack Water

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[6] Plaintiffs do argue that the Highway 10 land is "inaccessible." However, it is unclear whether plaintiffs argue it is inaccessible because of a lack of roads or because of the physical characteristics of the land.

Harbor.[7] On DEFENDANT'S EXHIBIT #12E, this is the eastern-most portion of the map, most of which is noted as either future or existing filled area. The Court lacks sufficient information to determine whether this land would be physically available, but for purposes of this order, the Court will assume that the area is not available and that only 61.6 acres of the 1325.52 acres in the Port Authority Area are available.

There was also evidence at trial that the map erroneously included a portion of land located within 750 feet of a historical structure, the downtown Y.M.C.A. Mr. Malone testified that this would cut out approximately one-third of the downtown area listed as available. Therefore, the Court will assume that only 3.6 acres are available rather than 5.4 as listed in DEFENDANT'S EXHIBIT #10.

When defendant's overall figures are reduced accordingly, only 1,061.69[8] acres remain available under the ordinance. This is approximately 1.67 percent of the city.[9] Testimony at trial indicated that 14.8 percent of commer-

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[7] The Slack Water Harbor area was not assigned a number on defendant's exhibit, and, therefore, it is unclear whether the bill of assurance would prohibit retail businesses in this area. The Court notes that Mr. Malone was also unclear on this point at trial. Tr. at 240.

[8] 2,327.41 - (1,325.52 - 61.6) - (5.4 - 3.6) = 1,061.69.

[9] Using defendant's figures that 2,327.41 acres represents 3.65 percent of the City, the Court assumes that, algebraically calculated, the City constitutes 63,765 acres. Therefore, 1061.69 acres is 1.67 percent of the 63,765 acres of the city.

cial and industrial areas are available under the ordinance.[10] Tr. at 274. Reduced by the same ratio as the overall acreage, this leaves 6.75 percent of the commercial and industrial areas.

There was also testimony that 212 sites or parcels were available under the ordinance. Tr. at 172-173. However, other testimony at the trial indicated that approximately only 20 to 25 "potential real sites" were available for location. Tr. at 270. It is unclear, what exactly was meant by the term "potential real sites." However, given this Court's prior discussion of what sites should be considered "available" under the law, the indication that 212 sites are available is more realistic. Reduced by the same ratio as the overall acreage, approximately 97 sites are available.

In *Alexander II*, the court upheld an ordinance where only 6.6% of the commercial land was available. *Alexander II*, 928 F.2d 283-84. Also, at least 120 blockfaces were available. *Id.* at 283 n.5. On the other hand, in *Alexander v. City of Minneapolis (Alexander I)*, 698 F.2d 936, 938 (8th Cir. 1983), the court declared that an ordinance which allowed only twelve possible legal sites for relocation would greatly suppress access to adult theaters. For this reason the ordinance was held unconstitutional.

The Court finds that the Little Rock ordinance, under the law of this circuit, leaves reasonable alternative avenues of communication open for these sexually oriented businesses. Assuming that 6.75 percent of the areas in which these businesses could locate is available under the

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[10] Apparently, these businesses may lawfully locate within light industrial zones as well as commercial zones.

ordinance and that 97 sites for relocation are also available, the Court finds that the restrictions under the ordinance comply with what the Eighth Circuit has declared reasonable.

II. BILL OF ATTAINDER

Although not addressed in their post-trial brief, plaintiffs also claim that the ordinance constitutes a bill of attainder under U.S. CONST. art. I, § 10, cl. 1.[11] In *United States v. O'Brien,* 391 U.S. 367, *reh'g denied,* 393 U.S. 900 (1968), the Supreme Court noted:

> This court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements-specificity in identification, punishment, and lack of a judicial trial-are contained in the statute.

Id. at 383 n.30. See also, *United States v. Van Horn,* 798 F.2d 1166 (8th Cir. 1986) and *Jensen v. Heckler,* 766 F.2d 383 (8th Cir.), *cert. denied,* 474 U.S. 945 (1985). In the Court's opinion the ordinance specifically defines a class of businesses that are subject to the terms of the

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[11] U. S. CONST. art. I, § 10 provides that

> No State shall . . . pass any Bill of Attainder . . . .

ordinance.[12] Also, the ordinance does not provide for a judicial trial to determine whether a business is in violation. Therefore, the question to be answered is whether the Little Rock ordinance imposes a "punishment."

Plaintiffs cite *Crain v. Mountain Home,* 611 F.2d 726 (8th Cir. 1979) in support of their argument. There the court stated that:

> The imposition on an easily identifiable individual or class of a sanction of mandatory forfeiture of job or office has long been considered punishment under the bill of attainder clause.
>
> > The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been imposed as punishment.

Id. at 728 (quoting, *United States v. Brown,* 281 U.S. 437, 448 (1965)). In *Crain,* the plaintiff, a member of the city council, had become a candidate for City Attorney, an elected position. On the eve of the election the other members of the council unsuccessfully sought plaintiff's voluntary resignation. In response, the council enacted

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[12] "Sexually oriented businesses" are specifically defined in the ordinance itself.

two ordinances that reduced the City Attorney's salary to $1.00 per year and prohibited the City Attorney from engaging in the private practice of law. Plaintiff challenged the two ordinances as bills of attainder. Defendant argued that the ordinance were necessary because of competing demands for city funds and the necessity of employing additional counsel to handle the city's legal problems. The Court disagreed and held that "'the law under challenge, viewed in terms of the type and severity of burdens imposed,' cannot 'reasonably . . . be said to further [these] nonpunitive legislative purposes.'" *Id.* at 729 (quoting, *Nixon,* 433 U.S. at 475-76). Indeed the court stated that the ordinances were punitive in that they were intended to constructively bar him from assuming the position to which he was duly elected.

This Court is of the opinion that the ordinance at bar is not punitive in nature. Although, as noted previously, the Court questions the true purpose of the ordinance, it is not prepared to hold that the ordinance does not "further . . . nonpunitive purposes." Indeed, these type of ordinances have been upheld on many occasions because of concerns with the secondary effects these businesses have on the areas in which they are located. Therefore, the Court concludes that the ordinance does not impose a "punishment" such that it must be declared a bill of attainder.

III. INVERSE CONDEMNATION

Again, although plaintiffs' post-trial brief does not address the issue of inverse condemnation, the complaint states that "[t]he ordinance violates the Fifth and Fourteenth Amendments to the U.S. Constitution because it constitutes an inverse condemnation of plaintiffs' busi-

nesses. The ordinance constitutes a taking of private property without just compensation because it is not prospective and because it is preclusive." COMPLAINT at 5. The Court notes that the ordinance provides for an amortization period of three years. Specifically, the ordinance provides:

> The nonconforming use will be permitted to continue for a period not to exceed three (3) years, unless sooner terminated for any reason or discontinued for a period of ninety (90) days or more. However, those sexually oriented businesses obligated by a written lease (executed prior to the passage of this article) that exceeds three (3) years from the effective date of this article, or whose activity involves the investment of money in leasehold or improvements such that a longer period is necessary to prevent undue financial hardship, are eligible for review by the planning commission for a reasonable extension.

LITTLE ROCK CITY CODE § 17-215(a). Obviously, this provision was designed to allow businesses an opportunity to recoup any investment they might otherwise be forced to lose.

The prevailing authority is that amortization clauses are a valid way to phase out nonconforming uses under a zoning ordinance as long as they are reasonable. *See,* 22 A.L.R.3d 1134. Indeed, several courts have held that shorter amortization periods than the one at bar are reasonable. *Northend Cinema, Inc. v. City of Seattle,* 585 P.2d 1153 (Wash. 1978), *cert. denied, Apple Theatre, Inc. v. City of Seattle,* 441 U.S. 946 (1979) (90-day amortization period upheld); *Centaur, Inc. v. Richland County,* 392 S.E.2d 165, 169 (S.C. 1990) (two-year

period upheld); *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd in part and rev'd in part*, 493 U.S. 215 (1980) (three-year period upheld).

In sum, this Court finds that the three-year provision in the ordinance is a reasonable period of time in which nonconforming businesses can be expected to recoup their investment. Even if three years is not enough time, the ordinance allows for businesses to apply for an extension. Furthermore, at the end of three years or any extension of the period, a nonconforming business is free to continue operating in one of the areas of the city allowed under the ordinance.

IV . CONCLUSION

For the foregoing reasons, the Court declares that LITTLE ROCK CITY ORDINANCE No. 15,629, codified as LITTLE ROCK CITY CODE §§ 17-211 to 17-216, is a constitutional time, place, and manner restriction under the First Amendment to the United States Constitution. Also, the ordinance does not constitute a bill of attainder under U.S. CONST. art. I, § 10, cl. 1 or a taking of property under the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, judgment will be entered dissolving the preliminary injunction and dismissing the complaint.

IT IS SO ORDERED this 28th day of January, 1993.

/s/ Stephen M. Reasoner
United States District Judge

[20 F.3d 858]
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1509EA

Ambassador Books & Video, Inc.;
Allan Dunlap, doing business as
United Arcade,

Appellants,

v.

City of Little Rock, Arkansas,

Appellee.

Appeal from the
United States District Court
for the Eastern District of Arkansas

Submitted: November 10, 1993
Filed: April 1, 1994

[*859] Before HANSEN, Circuit Judge, JOHN R. GIBSON* and FRIEDMAN**, Senior Circuit Judges.

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* The HONORABLE JOHN R. GIBSON was Circuit Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted, and took senior status on January 1, 1994, before the opinion was

FREIDMAN, Senior Circuit Judge.

This case involves constitutional challenges to a city ordinance that limits the areas of the city in which "sexually oriented businesses" may operate. The district court held the ordinance constitutional. We affirm.

I.

A. In August or September, 1985, the Board of Directors of the City of Little Rock, Arkansas ("City"), received a number of complaints about adult businesses operating within the city. City Manager Fleming sent a memorandum to City Attorney Stodola requesting research on regulating sexually oriented businesses. In response, Stodola asked two members of his staff to prepare an "In depth memo" on the subject. In this internal work assignment Stodola stated in a handwritten comment, "Please get together and draft a legal opinion on this—I want to shut these places down! Somehow."

The research indicated that the city could not legally ban adult businesses, but only could restrict the places they operate. The City Attorney's office then worked with the Department of Neighborhoods and Planning **[*860]** to formulate an appropriate method to regulate these businesses.

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filed.

** DANIEL M. FRIEDMAN, Senior Circuit Judge for the United States Court of Appeals for Federal Circuit, sitting by designation.

The office drafted a land-use, or zoning ordinance patterned on those other cities had adopted to limit the areas where such businesses could operate. In developing the ordinance, the City Attorney studied detailed reports of the actions of a number of other cities. These studies all showed an increase in crime and a decrease in property values in areas where adult business operated—particularly in residential neighborhoods. The City Attorney explained these studies, including the secondary effects of such businesses, to the City Planning Commission and the Board of Directors in connection with their consideration of the proposed ordinance. The City Attorney testified that "the fact that the citizens had complained about the secondary effects on them" was "what initiated this entire process of creating a land use regulation."

After holding public hearings, the city adopted the ordinance here at issue.

The ordinance contained introductory "whereas clauses" describing the secondary effects these businesses have, including the following:

> hearings have determined that these types of businesses ... may have a detrimental effect on the quality of [local] education; and ...
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> said hearings also elicited information expressing ... the detrimental effects these businesses have on the various uses of the properties mentioned; and
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> the Board of Directors have determined that the image of the City ... will be adversely affected by the presence of sexually oriented businesses ... ; and

> the location of sexually oriented businesses ... may lead to increased levels of criminal activity in the vicinity of such sexually oriented businesses; and
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> merchants in the City have expressed their concern about the adverse impact these types of businesses have on the value of their property and on their retail trade ... .

Under the caption "Purpose and intent", the ordinance stated:

> It is the purpose of this article to regulate sexually oriented businesses to promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this article to restrict or deny access by adults to sexually oriented entertainment to their intended market unless otherwise restricted by law.

§ 17-211.

The ordinance prohibits "sexually oriented businesses" from operating within 750 feet of: (1) religious facilities; (2) public or private elementary, secondary, or post-secondary schools; (3) boundaries of residential zones or any single-family or multiple-family use; (4) public parks; (5) medical facilities; (6) properties on the National Register of Historical Places or local historical] districts; or another

sexually oriented business § 17-214. "Sexually oriented businesses" are defined to include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motion picture theaters and adult theaters, § 17-212(9), each of which the ordinance further defines. § 17-212.

The City considered, but rejected as overly restrictive, a 1000-foot restriction, even though that restriction had been held constitutional. A 500-foot restriction also was rejected as insufficient to meet the City's concerns about the impact of such businesses on crime and on urban life and development.

The ordinance contains a so-called three-year amortization period, which permits existing sexually oriented businesses to continue for that period and authorizes "a reasonable extension" of that time if "necessary to prevent undue financial hardship." §17-215(a).

B. The appellants, Ambassador Books & Video, Inc. and United Arcade (collectively "Ambassador"), each operates an adult book **[*861]** store and adult arcade, which the ordinance prohibits them from operating because they are located within 750 feet of a church or residentially-zoned property. They are within the ordinance definition of "sexually oriented businesses."

At the end of the three-year amortization period, Ambassador continued to operate within locations the ordinance prohibited. After receiving notice that the ordinance would be enforced against it, Ambassador filed this suit in the United States District Court for the Eastern District of Arkansas, to enjoin operation of the ordinance. Ambassador alleged that the ordinance violated the First

and Fourteenth Amendments, constituted an inverse condemnation of its businesses, and was a Bill of Attainder.

After a bench trial, the district court[1] held that the ordinance is constitutional. The court held that because the ordinance "does not, on its face, ban sexually oriented businesses altogether," but, instead, "zones them into certain small, scattered sections of the city," the ordinance "is not content based but rather is correctly treated as a form of time, place, and manner regulation." The court ruled that the ordinance "leaves reasonable alternative avenues of communication open for the sexually oriented businesses." Although stating that the "Court is of the opinion that the city's predominant intent was to hinder or alleviate the operation of these adult businesses because of their content and not because of any secondary effects they might have caused," the court held that the ordinance "was designed to serve a substantial governmental interest" and, under the decisions of this court, met the standards of the First Amendment.

Finally, the court held that the ordinance did not constitute a Bill of Attainder because it "is not punitive in nature" and did not constitute inverse condemnation because the three-year amortization period "is a reasonable period of time in which nonconforming businesses can be expected to recoup their investment."

II.

A. The starting point in our analysis of the First Amendment issues is the Supreme Court's decision in *City*

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[1] The Honorable Steven M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1968). There, the Court upheld, as consistent with the First Amendment, a city ordinance that prohibited adult motion picture theaters from locating within 1000 feet of any residential zone, simple- or multiple-dwelling, church, park, or school.

The Court first held that because the ordinance "does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, [it] is therefore properly analyzed as a form of time, place and manner regulation." *Id.* at 46. The Court ruled that the ordinance was "content-neutral" because it was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." *Id.* at 47. The Court stated that in *Young v. American Mini Theatres. Inc.*, 427 U.S. 50 (1976), "a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49 (footnote omitted).

The Court ruled that "[t]he appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50. The Court held that the ordinance met that standard. It quoted with approval the statement of the majority in *American Mini Theatres* that "a city's 'interest in attempting to preserve the quality of urban life is one that **[*862]** must be accorded high respect.'" *Id.* The Court ruled that

in enacting the ordinance "Renton was entitled to rely on the experiences of Seattle and other cities," *id.* at 51, and rejected as imposing on the city "an unnecessarily rigid burden of proof" the court of appeals ruling that "because the Renton ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of Renton,' the city's justifications for the ordinance were 'conclusory and speculative."' *Id.* at 50.

Finally, the Court held that the ordinance, which left "some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites," permitted "reasonable alternative avenues of communication." *Id.* at 53.

Following *Renton*, this court twice has sustained the constitutionality under the First Amendment of municipal ordinances that restricted the areas in which adult businesses could operate. In *Alexander v. City of Minneapolis*, 928 F.2d 278 (1991), the ordinance required adults-only businesses to operate within certain specified areas of the city. Because the ordinance "does not ban adults-only businesses altogether, the District Court correctly treated [it] 'as a form of time, place and manner regulation.'" *Id.* at 282. Rejecting the district court's ruling that the standard for determining whether the ordinance provided "reasonable alternative avenues of communication" was "whether reasonable relocation possibilities exist for the protected businesses forced to shut down," we concluded that "numerous sites were potentially available for Alexander to relocate his theaters. Under the ordinance, theaters of this sort have access to at least 6.6% of the total acreage of commercial land . . . That Alexander could not secure property meeting his economic or commercial criteria does not render Section 540.410 invalid."

Id. at 283-4. We therefore held that Section 540.410 did not deny Alexander "a reasonable opportunity to open and operate an adult theater within the city." *Id.* at 284 (quoting *Renton*, 475 U.S. at 54).

In *Holmberg v. City of Ramsey*, 12 F.3d 140 (1993), the ordinance barred adults-only businesses from operating within 1000 feet of a day care center, a church, a bowling alley that serves liquor, and residential property. This court stated that the case "is largely controlled by *Renton*. Because the City's zoning ordinance limits the location of sexually oriented businesses rather than banning them altogether, the ordinance is analyzed as a form of time, place, and manner regulation of protected speech. . . . Regulations of this kind withstand First Amendment attack provided the regulations are content-neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative avenues of communication." *Id.* at 142 (citations omitted). The court held that the ordinance was "content-neutral":

> the ordinance's stated purpose is to lessen the undesirable secondary effects sexually oriented businesses have on surrounding neighborhoods, make these businesses less accessible to minors, prevent losses in property values, and reduce criminal activity. Like the district court, we find nothing in the ordinance that suggests the City Council passed the ordinance to suppress the message of Holmberg's sexual materials, rather than to limit the choice of locations for businesses like his. Thus, the ordinance, justified without reference to the content of the regulated speech, is content-neutral.

Id. at 143.

The court further held that the city had established that the ordinance served a sufficient governmental interest by "relying on other cities' studies showing that sexually oriented businesses have an adverse impact on surrounding neighborhoods. Because the City reasonably believed the studies were relevant to the problems in Ramsey, the City satisfied its burden." *Id.* Finally, the court ruled that there were available alternative sites to which Holmberg could relocate his business, despite the high cost of such sites. "Because the ordinance provides Holmberg with potential relocation sites in accessible commercially zoned areas, we conclude the ordinance does not unreasonably limit alternative avenues of communication." *Id.* at 144.

B. Under these standards, the Little Rock ordinance complies with the First Amendment. The ordinance does not prohibit sexually oriented businesses from operating, but only limits the areas in which they may do so. As the district court and Ambassador recognize, the ordinance is a typical time, place and manner regulation—here place—and is content-neutral. *Renton; Holmberg*.

The fact that the ordinance covers only a particular category of businesses—those that are sexually oriented—does not make it content based. *Id.* Here, as in *Renton*, the ordinance was "aimed not at the content of the" materials Ambassador handled at its book shops and arcades "but rather at the secondary effects of such [businesses] on the surrounding community" 475 U.S. at 47. Since the ordinance "can be justified without reference to the content of the regulated speech, it can be considered content neutral." *Doe v. City of Minneapolis*, 898 F.2d 612, 617 (8th Cir. 1990) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Relying on the district court's conclusion—which it labels a finding—that on the evidence before it, "the ordinance was enacted not to curb the secondary effects these businesses may cause but rather to suppress otherwise protected speech," Ambassador contends that this conclusion shows that the ordinance was content-based, not content-neutral. Ambassador's contention apparently is that because the City's purpose was to close its bookstores and arcades, the prohibitions of the ordinance necessarily were based upon the contents of the material it handled.

Courts, however, normally do not look behind the legislative findings and policy statements to attempt to discern the hidden (as distinguished from the stated) purpose of the legislation. In *Renton*, the court of appeals had held that if "a motivating factor" in enacting the ordinance was to restrict the theater owner's exercise of First Amendment rights, although its stated purpose was to deal with the secondary effects, the ordinance would be invalid. 475 U.S. at 47. The Supreme Court rejected this "view of the law," quoting the following statement from *United States v. O'Brien*, 391 U.S. 367, 383-4 (1968):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.
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> * * *
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> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

475 U.S. at 47-48.

The Court also stated in *O'Brien*: "Inquiries into congressional motives or purposes are a hazardous matter." 391 U.S. at 383.

In *Fleming v. Nestor*, 363 U.S. 603 (1960), the Court said "that only the clearest proof could suffice to establish the unconstitutionality of a statute" on the ground that "a punitive purpose in fact lay behind the statute." *Id.* at 617. The Court stated: "Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Id.*

Although those cases dealt with Acts of Congress, the principle they announced is equally applicable to municipal ordinances.

The evidence on which the district court relied to support its conclusion that the city's true, but hidden, intent in enacting the ordinance was different from what the ordinance itself stated, falls far short of what would suffice to justify disregarding the plain and clear statement of the ordinance's purpose.

First was the handwritten statement by the city attorney, in instructing his staff to prepare a comprehensive opinion on dealing with sexually oriented businesses, that he "want[ed] to shut these places down! Somehow." This was the personal objective of the city attorney, who was not a member of the body that adopted the ordinance, and after he was informed that this could not be done, **[*864]** he changed his approach to the problem in favor of limiting the areas in which the businesses could operate. The

City Attorney testified that in the ordinance he was "in no way, shape, form or fashion... attempting to" "put these people and these sorts of businesses out of business." "We knew that the law didn't allow that."

Second was that in 1988 the city had a list of seven establishments, all of which would have had to relocate under the ordinance as enacted. This list does not indicate an improper motive by the city, but reflects the research the city did in considering potential problems or secondary effects.

Third was that the vice squad distributed copies of the ordinance to business owners one month before the expiration of the three-year grace period. This action does not even suggest that the city adopted the ordinance in an attempt to put these entities out of business.

Finally was the absence of any explicit evidence of actual secondary effects these businesses had. That does not show an improper purpose by the city. As noted, the city studied the problem because of complaints and concerns it had received from citizens about the sexually oriented businesses. Moreover, Renton recognized that in adopting such an ordinance, a city "was entitled to rely on the experiences of ... other cities," 475 U.S. at 51—as Little Rock did here. This court has rejected the argument that adult business ordinances must be founded upon local experience. *Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226-27 (8th Cir. 1990) ("To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them").

Since the ordinance is a content-neutral time, place and manner regulation, the "appropriate inquiry in this case, then, is whether [it] is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton*, 475 U.S. at 50. The Little Rock ordinance satisfies both of these requirements.

1. The "whereas" clauses of the ordinance set forth the various adverse secondary effects these sexually oriented businesses had on the City. The stated purpose of the ordinance is

> ... to promote the health, safety and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this article have neither the purpose nor effect of imposing a limitation or restriction on the content of any materials.

This is a substantial government interest. "[A] City's interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Renton*, 475 U.S. at 50 (quoting from plurality opinion in *American Mini Theatres*, 427 U.S. at 71). *See also Alexander*, 928 F.2d at 282-3; *Holmberg*, 12 F.3d at 143. The district court here recognized that "on its face, the ordinance declares its purpose to be the amelioration of secondary effects."

In sum, as the district court stated, the Little Rock ordinance "was designed to serve a substantial governmental interest."

2. The remaining issue is whether the ordinance per-

mits reasonable alternative avenues of communication. We agree with the district court that it does.

The district court found—and the findings are not clearly erroneous—that 6.75 percent of the areas in which these businesses could locate was available under the ordinance and that there were 97 available relocation sites. This percentage is comparable to the "more than five percent" in *Renton* and the 6.6 percent in *Alexander*, which were held to provide reasonable alternative avenues of communication. Indeed, the appellant United Arcade applied for and received a conditional use permit to relocate to one of those areas. Although Ambassador argues that the cost of relocation to all or many of those areas would prevent relocation, the cost factor is unimportant in determining whether **[*865]** the ordinance satisfies the standards of the First Amendment. *Renton*; *Alexander*.

III.

Ambassador contends that the application of the ordinance to its existing businesses denies it due process in violation of the Fourteenth Amendment, and also violated its First Amendment rights. It argues that such ordinances "can only be prospective in application," but cites no authority for that conclusion.

The Little Rock ordinance does not prohibit the operation of Ambassador's adult book shops and arcades, but only limits the areas where they may operate. Although Ambassador is entitled to protection against arbitrary government action toward its business, it has no absolute right to continue to operate that business at the same location. A zoning ordinance restricting possible uses of

]and will be upheld unless it is arbitrary and unreasonable and has no substantial relation to the public health, safety, or general welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Zahn v. Bd. of Public Works*, 274 U.S. 325, 328 (1927).

Our holding in Part II that the Little Rock ordinance is designed to serve a substantial governmental interest and permits reasonable alternative avenues of communication also answers Ambassador's due process claim and its claim that the First Amendment bars application of the ordinance to its existing business. The application of the ordinance to Ambassador was not arbitrary or capricious. Moreover, the three-year amortization period, which could be extended, reflected "the City's efforts to allow these business owners to amortize their investment over a three-year-period in their current location." The validity of a three-year amortization period was upheld in *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1071 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part and vacated in part*, 493 U.S. 215 (1990).

In *Alexander*, we upheld the application of the ordinance there to existing businesses. That ordinance applied to—and its validity was litigated by—existing businesses. Contrary to Ambassador's contention, the issue was litigated in *Alexander*. *See also Holmberg*, 12 F.3d at 141 (upholding a similar restrictive ordinance which required a preexisting establishment to relocate).

IV.

Finally, Ambassador alleges that the Ordinance is a bill of attainder, in violation of Article I, Section 10. In *O'Brien*, 391 U.S. at 383 n.30, the Supreme Court noted:

> This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute.

Applying this standard, the district court correctly rejected Ambassador's bill of attainder argument, because the ordinance "is not punitive in nature." The restrictions in the ordinance on the areas in which sexually oriented businesses may operate were imposed not to punish the operators of those businesses for their past conduct, but to protect the citizens from the adverse secondary effects those businesses have on the quality of life in the areas where they operate. Since the Little Rock ordinance reasonably furthers nonpunative legislative purposes, *see Nixon v. Adm. of Gen. Serv.*, 433 U.S. 425, 473, 475-76 (1977), it is not a bill of attainder. *Accord Crain v. City of Mountain Home*, 611 F.2d 726, 729 (8th Cir. 1979).

The order of the district court dismissing the complaint (and denying a preliminary injunction) is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.